Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(1)

No. 03-43

IN THE

Supreme Court of the United States

MAHENDRA KUMAR SAGAR,

Petitioner,

v.

SEJAL SAGAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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Dated: July 1, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

32 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in a case where parents are devout Hindus, and where the best interest of their daughter was not at issue and the child had been strictly raised in the Hindu faith, the Massachusetts Courts violated the petitioner's Free Exercise rights and the Liberty Interests protected by the First and Fourteenth Amendments of the United States Constitution by requiring the petitioner to give a compelling reason why he should be allowed to continue his daughter's indoctrination into the customs and practices of the their faith, over the mother's philosophical and personal objections.

PARTIES TO THE PROCEEDING

The Petitioner, Mahendra Kumar Sagar is the former husband of the Respondent, Sejal Sagar, who are individuals who reside in the Commonwealth of Massachusetts.

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Petitioner, Mahendra Kumar Sagar respectfully prays that a *Writ of Certiorari* issue to review the order entered by the Supreme Judicial Court of the Commonwealth of Massachusetts on April 2, 2003, (App. A p. 1a), and the decision of the Court of Appeals of the Commonwealth of Massachusetts, dated January 14, 2003 (App. B p. 2a).

OPINIONS BELOW

The opinion of the Court of Appeals for the Commonwealth of Massachusetts, dated January 14, 2003, that affirmed a judgment of divorce of the parties, (App. B 13a), is reported at 57 Mass. App. Ct. 71, 781 N.E. 2d 54. The declination of the Supreme Judicial Court of the Commonwealth of Massachusetts for further appellate review dated April 2, 2003, is reproduced at App. A 1a.

JURISDICTION

The judgment of the Court of Appeals was entered January 14, 2003, and the Supreme Judicial Court of the Commonwealth of Massachusetts declined to reconsider its declination of further appellate review. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right of freedom to practice religion as guaranteed by the First Amendment of the United States Constitution of the United States as applied to the States through the Fourteenth Amendment. "Congress shall make no law respecting the es-

tablishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech. U.S. CONST. amend I.

STATEMENT OF THE CASE

This matter involves the performance by the petitioner of the Hindu ritual of Chudakarana upon his 2-year old daughter.

This matter was commenced by a Complaint for Divorce filed in the Middlesex Probate Court on December 3, 1999. A trial occurred over a five-day period on March 28, 2001, March 29, 2001, April 9, 2001, April 10, 2001 and April 20, 2001.

Prior to trial the husband filed a Motion to be allowed to perform the Hindu ceremony of Chudakarana upon his then two-year old daughter. Decision upon this Motion was reserved for trial.

On May 9, 2001 the Probate Court issued Judgment of Divorce and Order. In the Judgment, the Court ordered in paragraph 1 G. that:

> The religious ceremony known as the Chudakarana shall not be performed upon the minor child, until the child is of sufficient age to make that determination herself, absent a written agreement between the parties.

The Petitioner appealed from that Order, to the Massachusetts Appeals Court which issued a decision on January 14, 2003 affirming the Probate Court Judgment. The petitioner sought Further Appellate Review from the Massachusetts Supreme Judicial Court which denied on April 2, 2003.

The parties were married in a Hindu religious ceremony in Barouda, India on July 17, 1990. The husband had been raised as a devout Hindu and during his upbringing his family participated in numerous religious ceremonies.

Prior to the wedding the parties participated in the customary Hindu rituals. They had an intention party where the parties announce their intent to become engaged. After that the parties had a traditional Hindu engagement party.

The parties had a traditional Hindu wedding in the place of the husband's ancestry. The wedding ceremony took 2½ hours and involved many Hindu rituals.

In 1992 the parties moved to Massachusetts and on July 17, 1996 the parties became lawful resident aliens.

During their marriage, they attended a Hindu temple on a weekly basis and participated in numerous religious ceremonies and festivals at the Temple.

The parties' daughter was born on June 17, 1998 and when their daughter was 6 months old, the parties separated with the husband leaving the home.

REASONS FOR GRANTING THE WRIT

If the decision below is permitted to stand as a precedent, the Massachusetts courts could enforce one parent's philosophical and personal wishes that Last Rights, Baptisms, First Communions, Bar Mitzvahs and Circumcisions not be performed on a child raised in a particular religion, against the other parent's religious beliefs.

This petition is not submitted to correct a lower court mistake or error. The courts below have stepped on a Constitutional third rail. The courts below not only changed the timing of the ritual of Chudakarana[1] it modified a ritual that was prescribed 3,500 years ago by removing from the parents the ability to have the ritual performed and bestowing upon the child the authority to elect to have the ritual performed at all. To permit state courts to become ecclesiastical arbitrators that have the ability to modify religious rituals will create an ecclesiastical disaster that is in violation of the core concept of the Establishment Clause.

At the outset it should be noted that the Chudakarana ritual was but one of a progression of rituals

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[1] The Chudakarana, which means the tonsure, is one of the basic customs that Hindus must follow from conception until after death. It is usually performed either before the child's first birthday or between the 2nd and 3rd year of life. Chudakarana is important because the hair is considered to be very sacred and giving the hair to God will assure the longevity of the child and protect it from illness. If the Chudakarana is not performed there is a fear that the child will become sick and many parishioners believe this to be true. Moreover Hindu custom believes that both parties must have had Chudakarana performed for a marriage to be blessed.

The procedure starts by praying to one of the deities and a reading to promote peace. Hair is taken from five parts of the child's head. Mantras are then recited and some of the hair is offered by ritual to the Brahmans. A barber then shaves the head, with an electric razor ritual mark is placed on the head and benedictions given to the child.

If a Hindu should for some reason fail to perform the mandatory house rituals, which includes Chudakarana, the father can perform an atonement, but still has to perform the ritual at a later date. The atonement for the failure to perform Chudakarana falls within the general category of Prajaptya atonements which require the sinner to fast for 12 days by subsisting upon five products of the cow, cow dung, cow urine, milk, curd and ghee or clarified butter.

performed by the parents and Hindu priests designed to accept the child into the Hindu religion. The Chudakarana ritual was deemed not to be harmful to the child in any way (App. B p. 10a). *See Kendall* v. *Kendall,* 426 Mass. 238 (1997); *Felton* v. *Felton,* 383 Mass. 232, 233 (1981).

The First Amendment's prohibition against state interference with the free exercise of religion rings hollow when the state can arbitrarily halt and alter a religious ceremony unless the petitioner offers a compelling reason to the state for its continuance.

This requirement imposed by the courts of Massachusetts places the burden on the petitioner of disproving the negative; namely that his not continuing with his daughter's religious indoctrination, would not affect her religious upbringing in the Hindu religion.

The courts below committed constitutional error when they placed the burden on the petitioner, who wanted to do nothing more than continue his daughter's religious education and indoctrination into the practices and customs of her faith, especially where the record below showed that the parents professed to be devout Hindus, and where, as the court below noted "both parties [during their marriage] engaged in Hindu ceremonies prescribed to mark various transitions in an infant's life, including a religious baby shower, a homecoming ceremony, a naming ceremony, a first visit to the temple, a ceremony for the child's first solid food," and where "[t]he parties attended temple weekly and even had a temple in their home at which they worshiped on a daily basis[]" Appendix B pp. 4a-5a.

It is respectfully submitted that this Honorable Court must intervene to prevent state courts from acting as ecclesiastical bodies, and to protect the Liberty

Interest of parents to raise their children in their religions free from governmental interference.

I. THE COURTS IN MASSACHUSETTS UNCONSTITUTIONALLY INTERFERED WITH PETITIONER'S FREE EXERCISE RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENT.

A. The courts of Massachusetts committed constitutional error in halting the performance of a ritual of the Hindu religion that prescribed that Chudakarana (to be performed before age three) could be postponed and left to the child to decide as part of her own destiny, or alternatively be performed if the mother acquiesced.

The essential facts in this case are not in dispute and were adequately recounted by the court below (Grasso, J.). *See*: Decision, Appendix B at 4a-5a. Summarized, they are as follows: After a contentious divorce proceeding the father (petitioner) who had joint custody of his daughter, a minor child under the age of three, wanted to have his daughter undergo the Hindu ritual of Chudakarana. The ceremony was not harmful physically or psychologically to the child. Appendix A p. 10a. The father stated and presented evidence in the form of expert testimony that his religion was very clear on the matter: Chudakarana had to be performed before the age of three and that the ritual may not be delayed. *See* Appendix B p. 5a.

However, if the ceremony is not performed as proscribed, an elder, the father, may atone, allowing the ceremony to be performed at a later date. The petitioner (the father) in this case did not want to proceed

along that line since atonement was not necessary if the ceremony was performed.

The court below summarized the mother's objection to the ritual as follows: "The wife's position was that Chudakarana is not integral to the Hindu faith. Neither she nor her extended family believe in the efficacy or necessity of the ceremony." Appendix A at p. 6a.

The court below incorrectly saw the issue as implicating both the husband and the wife's fundamental rights to raise and rear a child according to their religious beliefs, *citing Troxel* v. *Granville*, 530 U.S. 57, 65-66 (2000) and other cases.

i. Philosophical or personal preferences of one parent should not stand in the way of the continuance of the religious upbringing of a child by another parent.

It is uncontested in this case that the parents were both devout Hindus. Appendix A p. 4a. Neither is it contested that the daughter of these parents was raised from birth in the Hindu religion. *Id.* p. 4a, or that both parents wanted their daughter raised in their faith. *Id.* p. 4a, or that the ceremony in question, Chudakarana, would not be harmful to the child. *Supra.*[2]

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[2] As this Court noted, "[t]o be sure, the power of a parent, even when linked to a free exercise claim, may be subject to limitation under Prince [] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin* v. *Yoder*, 406 U.S. 233-234. Such is not the case here. The court below acknowledges that there was no risk of harm or injury to the child if Chudakarana was performed. As justification for its ruling, the court below stated that the husband failed to give a compelling state reason why the wife's objec-

The mother, however, believed that the ceremony of Chudakarana could wait. The courts below reasoned, thusly: "For the court to issue an order upholding the husband's fundamental right to direct that the ceremony of Chudakarana be performed upon the child would repudiate permanently the wife's corresponding right to direct that the ceremony not be performed. Conversely, to order that the ceremony of Chudakarana not be performed, as the wife would have it, would repudiate the husband's fundamental rights." Appendix B p. 12a. The father said his faith required that the ceremony be performed by the age of three. The father (petitioner) offered expert testimony that Chudakarana must be performed and that it should be performed before the age of three. *Supra.*

The mother's beliefs were sincerely held, but philosophical and personal.[3] Such beliefs when weighed against orthodox religious practice rooted in millennia of Hindu tradition cannot rise above the father's desire to continue his daughter's religious education and indoctrination into its customs and practices. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972). The latter interest has been protected, "sometimes even at the expense of other interests of admittedly high social importance." *Id.* at 214. Accordingly, "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemp-

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tion to the continuance of their daughter's religions upbringing should be overridden.

[3] The court below summarized her philosophical beliefs thusly: "The wife's position was that Chudakarana is not integral to the Hindu faith. Neither she nor her extended family believe in the efficacy or necessity of the ceremony. She did not participate in the ceremony, nor did her brother or cousins. Prior to marriage, the husband never inquired whether she had participated in Chudakarana; neither did she inform him that she had not." Appendix B p. 6a.

tion from generally applicable [] requirements." *Id.* at 235.

The courts below committed constitutional error in deciding that the ceremony could be delayed until the child was old enough to make up her own mind about whether she wanted to follow the rituals of her religion. As this Court has stated, however, "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and a capacity for judgment required of making life's difficult decisions." *Troxel* v. *Granville*, 530 U.S. at 68.

For a court to halt and also amend and then order a delay in a millennial old religious ritual because the mother didn't think it necessary or defer to a child because the child, being under the age of three, could be given more time to mature and make up her own mind, constitutes improper state action, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) and flatly contradicts this Court's admonition that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. at 215.

II. THE COURTS IN MASSACHUSETTS IMPERMISSIBLY INTERFERRED WITH THE PETITIONER'S FREE EXERCISE RIGHTS IN VIOLATION OF THEIR OWN PRECEDENT.

In a case such as this where there are conflicting beliefs of two custodial divorced parents regarding the proper upbringing of their daughter in the rituals and beliefs of their religion, the courts of Massachusetts will generally not interfere with a religious exercise unless there is demonstrable physical or psychological harm to the child. *Blixt* v. *Blixt*, 437 Mass. 649, 655-

657, 669 (2002). A compelling state interest, such as physical or psychological harm must be shown. *Kendall* v. *Kendall*, 426 Mass. 238, 243, 249-250 (1997), and *Blixt* v. *Blixt*, 437 Mass at 656. *See also*, *Wisconsin* v. *Yoder*, 406 U.S. at 230. (Deferring to parental rights with respect to religious upbringing of children absent harm to children's physical or mental health.)

Where the courts below committed constitutional error in this case was in requiring the petitioner to justify why the continued indoctrination of his daughter into the practices and customs of the Hindu religion should be allowed to continue against his wife's desire that this one practice not be allowed at this time. The wife's personal or philosophical beliefs, feelings, inclinations or social desires, notwithstanding. *See, Wisconsin* v. *Yoder*, 406 U.S. at 215 cannot and should not take precedence over continuing, uninterrupted, the daughter's ceremonial indoctrination into the rituals and customs of the Hindu faith. Requiring such to be the case placed the petitioner here in the same dilemma as the courts of the state of Washington placed *Granville*: "In effect, the judge placed on *Granville*, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughter." *Troxel* v. *Granville*, 530 U.S. at 69.

The decisional framework employed by the courts below directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. *Troxel, citing Parnham* v. *J.R.*, 442 U.S. 584, 602 (1979).

The court below cited the proper standards, but applied them in a constitutionally offensive manner by requiring that a religious exercise be halted, altered, and postponed until a minor grew into adulthood, or alternatively, until a mother's whim changed. When the Massachusetts Appeals court affirmed the ruling

of the Probate judge in the above regard, constitutional error occurred to the detriment of the father. Absent physical, psychological or significant emotional harm to the child, the duty of the court below was to preserve uninterrupted the free exercise rights of the petitioner. The Fourteenth Amendment's Due Process Clause, "also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel* v. *Granville*, 530 U.S. at 65 for "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 65-66.

This protection was clearly not given.

CONCLUSION

Petitioner prays that certiorari will issue.

Respectfully submitted,

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Dated: July 1, 2003

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APPENDIX A

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Elton Watkins, III, Esquire
306 Dartmouth Street
Boston, MA 02116

RE: Docket No. FAR-13226

SEJAL MAHENDRA SAGAR
vs.
MAHENDRA KUMAR SAGAR

Middlesex Probate & Fam No. 98D4411 DVI
A.C. No. 2002-P-0089

NOTICE OF DENIAL FOR F.A.R. APPLICATION

Please take note that on 04/02/03, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: April 2, 2003

To: John E. McCabe, Esquire
Elton Watkins, III, Esquire

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
CLERK'S OFFICE
1500 NEW COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8106

January 14, 2003

Elton Watkins, III, Esquire
306 Dartmouth Street
Boston, MA 02116

RE: No. 2002-P-0089

SEJAL MAHENDRA SAGAR
vs.
MAHENDRA KUMAR SAGAR

NOTICE OF DOCKET ENTRY

Please take note that on January 14, 2003, the following entry was made on the docket of the above-referenced case:

Decision: Full Opinion (Grasso, J.). Judgment affirmed. *Notice.

Very truly yours,

The Clerk's Office

Dated: January 14, 2003

To: John E. McCabe, Esquire
Elton Watkins, III, Esquire

02-P-89 Appeals Court

SEJAL M. SAGAR vs. MAHENDRA K. SAGAR.

No. 02-P-89.

Middlesex. October 16, 2003. - January 14, 2003.

Present: Cypher, Smith, & Grasso, JJ.

Divorce and Separation, Child custody. Constitutional Law, Freedom of religion. Due Process of Law, Child custody proceeding.

Complaint for divorce filed in the Middlesex Division of the Probate and Family Court Department on December 3, 1998.

The case was heard by Spencer M. Kagan, J.

Chester Darling (Elton Watkins, III, with him) for Mahendra K. Sagar.

John E. McCabe for Sejal M. Sagar.

GRASSO, J. In the course of contentious divorce proceedings between two devout Hindus, the husband moved the court for permission to perform a Hindu religious ritual, Chudakarana,[1] upon the parties' young daughter. After a hearing, a Probate Court judge ordered that, "The religious ceremony known as Chudakarana shall not be performed on the minor child, until the child is of sufficient age to make that determination herself, absent a written agreement

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[1] On this record, Chudakarana can be described as a ceremony involving tonsure and prayer. While mantras are recited, a priest removes hair from five parts of the child's head, offering some of the hair ritually. The child's entire head is shaved, and an auspicious mark is then placed on the child's head, and benedictions are offered.

between the parties." On appeal from a divorce decree incorporating this order, the father maintains that the order violates his right to free exercise of religion as guaranteed by the First Amendment to the United States Constitution and the Constitution of the Commonwealth. He also claims the judge erred in granting the wife physical custody over the recommendation of a guardian ad litem that no designation of a primary physical custodian should be made.

We conclude that, in the circumstances presented, where neither parent demonstrated a compelling State interest justifying intervention, the judge's order should be affirmed because it intrudes least upon both parents' fundamental rights while remaining compatible with the child's health. We also conclude that the judge did not abuse his discretion in granting physical custody to the mother.

Background. We recite the following background from the judge's factual findings. Sejal Sagar (wife) and Mahendra Sagar (husband) were married in Baroda, India, in 1990 in a traditional religious ceremony. They had known each other for less than a month; the marriage had been arranged by their respective parents. After marriage, the couple moved to the United States, where their only child, a daughter, was born on June 17, 1998. They separated in November, 1998.

During and after marriage, the parties followed substantially the tenets of the Hindu faith. During the wife's pregnancy and after their daughter's birth, the parties engaged in Hindu ceremonies prescribed to mark various transitions in an infant's life, including a religious baby shower, a homecoming ceremony, a naming ceremony, a first visit to the temple, a ceremony for the child's first solid food, and an ear piercing ceremony. The parties attended temple

weekly and even had a temple in their home at which they worshiped on a daily basis.

Their relationship was volatile and marred by numerous instances of the husband's physical and mental abuse of the wife. At various times, the husband threw things at the wife, hit her with a rolling pin, pulled her hair, chased her from their house, and burned her with a cigarette. He tore apart a book given her by her brother. The husband was very controlling. He would allow his wife to telephone her relatives only on birthdays and anniversaries; and the contents of the kitchen cabinets had to be arranged as he specified. He threatened to stop paying tuition for the wife's education should she fail to get straight A's. The husband made questionable transfers of marital assets and refused to comply with a court order to hold certain funds in escrow.

Discussion

1. The disagreement over Chudakarana. Apart from disagreement over whether the Hindu sacrament of Chudakarana should be performed, the parties are in substantial agreement over the rearing of their daughter, including her religious upbringing. At trial, the husband presented evidence to support his position that a Hindu may not forgo the ritual of Chudakarana. The ceremony, which is believed to contribute to the child's longevity and ward off illness, should be performed before the child is three years old and is a necessary prerequisite to Hindu marriage. If the ceremony is not performed, an elder (here the father) may atone, allowing the ceremony to be performed at a later date.[2] The wife's position was that

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[2] The atonement consists of a twelve-day fast, during which only food given voluntarily by others may be eaten on three of the days. Other variations on the fast permit consumption only of five products of the cow: urine, dung, milk, curd, and ghee (clarified butter).

Chudakarana is not integral to the Hindu faith. Neither she nor her extended family believe in the efficacy or necessity of the ceremony. She did not participate in the ceremony, nor did her brother or cousins. Prior to marriage, the husband never inquired whether she had participated in Chudakarana; neither did she inform him that she had not.

a. The husband's free exercise claim and the requirement of a sincere religious belief. The father claims that the right to insist upon performance of Chudakarana upon his child is protected under both State and Federal Constitutional provisions respecting free exercise of religion. The judge's decision appears to conclude that the husband's free exercise claim fails because it is not grounded in a sincerely held religious belief. An essential prerequisite to a free exercise claim is a sincerely held religious belief. See Dalli v. Board of Educ., 358 Mass. 753, 758 (1971) ("If the beliefs be sincerely held they are entitled to the same protection as those more widely held by others"); Attorney Gen. v. Desilets, 418 Mass. 316, 323 (1994) ("Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion.") A court may not examine the truth behind a person's religious beliefs. See United States v. Ballard, 322 U.S. 78, 86 (1943) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.") However, inquiry into the sincerity of a professed belief is constitutionally appropriate under both the First Amendment, see Wisconsin v. Yoder, 406 U.S. 205, 216 (1972); and art. 2 of the Massachusetts Constitution. See Dalli v. Board of Educ., 358 Mass. at 758; Attorney Gen. v. Desilets, 418 Mass. at 329-330; Opinion of the Justices, 423 Mass. 1244, 1246-1247 (1996).

The judge did not question the husband's general devotion to Hinduism. At the same time, he found that "the husband's reasons for his insistence on having the Chudakarana are not purely religious[,] [but] an issue of control." The record supports this determination. We credit, as we must, the judge's finding, based upon his credibility assessment. See Felton v. Felton, 383 Mass. 232, 239 (1981). However, the determination that the husband's motivation is not "purely religious" is different altogether from whether his belief is "sincerely held." We need not, and should not, predicate a decision implicating a parent's free exercise right and his fundamental liberty interest in child rearing upon the tenuous ground that the parents' underlying religious belief is not "sincerely held" because the motivation is not "purely religious."[3]

b. The competing fundamental rights. Although the husband conceptualizes the probate judge's action as a State-imposed limitation on his own free exercise of religion, whether Chudakarana is performed upon the child implicates not only the husband's but also the wife's fundamental rights. These include the right to direct their daughter's upbringing and religious formation.

The due process clause protects certain fundamental rights and liberty interests, including the right of a parent to direct a child's education and upbringing. See Troxel v. Granville, 530 U.S. 57, 65-

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[3] We also cannot delve into differences between the parties over whether strict adherence to Hindu religious belief requires that Chudakarana be performed. Resolution of that matter clearly would involve assessment of the religion's doctrine. See Williams v. Episcopal Diocese of Massachusetts, 436 Mass. 574, 579-580 (2003). The First Amendment protects sincerely held religious beliefs even when these differ from the established dogma of a religion or are not accepted as dogma by any religion. See Pielich v. Massasoit Greyhound, Inc., 423 Mass. 534, 538 (1996).

66 (2000), and cases cited; Opinion of the Justices, 427 Mass. 1201, 1203 (1998) ("parents have a fundamental interest in their relationships with their children that is constitutionally protected"); Blixt v. Blixt, 437 Mass. 649, 652 (2003) (liberty interests of parents protected by the due process clause of the Fourteenth Amendment to the Federal Constitution are also protected by our State Constitution). When custody is contested, it is the divorcing parents who seek the impairment of each other's rights, and the "[S]tate is thrust into the role of mediator by necessity." Carr v. Carr, 44 Mass. App. Ct. 924, 925 (1998) (citation omitted). "In divorce proceedings, each parent is presumed to have equal custody, G. L. c. 208, § 31, and the court is only called on to make determinations as to a child's 'best interests' because the parties normally charged with making such decisions cannot themselves agree." Blixt v. Blixt, 437 Mass. at 677. (Sosman, J., dissenting). For the court to issue an order upholding the husband's fundamental right to direct that the ceremony of Chudakarana be performed upon the child would repudiate permanently the wife's corresponding right to direct that the ceremony not be performed. Conversely, to order that the ceremony not be performed, as the wife would have it, would repudiate the husband's fundamental rights.

A court is justifiably loath to order a restriction on either parent's fundamental rights to free exercise of religion and to determine the child's religious upbringing and is constitutionally limited in doing so unless there is a compelling State interest such as preventing demonstrable physical or psychological harm to the child. See Blixt v. Blixt, 437 Mass. at 655-657, 669. Put differently, when parents' religious views or practices conflict and cannot mutually coexist, the State may not intervene to vindicate one parent's fundamental rights to the exclusion of the other parent's rights unless a compelling State

interest, such as physical or psychological harm, is shown. See Kendall v. Kendall, 426 Mass. at 249-250; Blixt v. Blixt, 437 Mass. at 656.

c. Intersection of the fundamental right to parent and the right to freely exercise one's religion. "[P]arents together have freedom of religious expression and practice which enters into their liberty to manage the familial relationships. . . . But the 'best interests' of the child are to be promoted, and when the parents are at odds, the attainment of that purpose may involve some limitation on the liberties of one or the other of the parents." Felton v. Felton, 383 Mass at 233. See also Wisconsin v. Yoder, 406 U.S. at 230 (deferring to parental rights with respect to religious upbringing of children absent harm to children's physical or mental health); Kendall v. Kendall, 426 Mass. 238, 243 (1997).

When the religious beliefs or practices of parents conflict and one parent seeks to have the court intervene and order that his religious inclinations be enforced to the exclusion of the other parent's, the parent seeking enforcement bears the burden of proving that the conflicting beliefs or practices cannot coexist without harm to the child such that a compelling State interest justifies restricting the correlative fundamental rights of the other parent. See Felton v. Felton, 383 Mass. at 240-241; Kendall v. Kendall, 426 Mass. at 248-250.

Here, the husband failed to demonstrate a compelling State interest for performing the ceremony on the child. Evidence was lacking that failure to perform the ceremony would "cause the child significant harm by adversely affecting the child's health, safety, or welfare." Blixt v. Blixt, 437 Mass. at 658. "[H]arm to the child from conflicting religious instructions or practices, which would justify such a limitation [on a parent's right to freedom of religious

expression or practice] should not be . . . assumed or surmised; it must be demonstrated in detail." Felton v. Felton, 383 Mass. at 233-234. The judge would have erred had he concluded that a compelling State interest justified restricting the wife's fundamental rights by ordering that the ceremony be performed. See and compare id. (order restricting father's fundamental right to instruct children in Jehovah's Witness religion was not constitutionally permissible because mother failed to demonstrate the requisite physical or psychological harm to the child).

The question remains, however, as to the consequence of the husband's failure of proof. The wife did not establish that performing the ceremony would subject the child to physical or psychological harm, a compelling State interest that would support an order restricting the husband's fundamental rights. The judge was not required to order that the ceremony be performed, as the husband wished, merely because the wife had failed to prove that to do so would be harmful to the child. See Blixt v. Blixt, 437 Mass. at 656. Resolution of such a quandary that implicates both parents' fundamental constitutional rights should not depend solely upon a fortuity of pleading, upon which party initially seeks court assistance. Often, even though the competing parental religious preferences are irreconcilable, no physical or psychological harm will inure to the child from either parent's religious inclinations. "Sometimes . . . . diversity of religious experience [can be] a sound stimulant for a child." Kendall v. Kendall, 426 Mass. at 249.

Here, the evidence did not establish either proposition -- that the child would suffer physical or psychological harm by undergoing or by not undergoing the disputed ceremony. A rule whereby the opposing parent's religious inclination must prevail when the moving parent fails to carry the

requisite burden of proof would create an arbitrary and unsatisfying basis for decision. Had the other parent been the moving party, such a burden would have been upon her. Consequently, the rule cannot require that, unless the moving party proves physical or psychological harm, the other parent's inclination necessarily prevails.

However, the State must not sit idly by in the absence of proof by one parent of a compelling interest that justifies restricting the other parent's competing and irreconcilable fundamental rights. The State has a compelling interest in adjudicating disputes between parents who seek the impairment of each other's fundamental liberty interest in child rearing. See Blixt v. Blixt, 437 Mass. at 652, 669. This compelling interest requires an accommodation that "intrudes least on the religious inclinations of [either] parent and is . . . compatible with the health of the child." Felton v. Felton, 383 Mass at 235. State action such as this that infringes on a fundamental constitutional right is to be examined under a strict scrutiny formula requiring (1) a compelling State interest, and (2) action narrowly tailored to further that interest. Blixt v. Blixt, 437 Mass. at 655-656.

The judge's denial of the husband's motion may give the appearance of endorsing the result requested by the wife, that the ceremony not be performed. However, the judge's order is not the equivalent of directing that the ceremony never be performed. Nor is the order predicated upon a determination that physical or psychological harm would befall the child from performing the ceremony. Rather, absent proof either way, the order is a narrowly tailored accommodation that "intrudes least on the religious inclinations of either parent and . . . is compatible with the health of the child." Felton v. Felton, 383 Mass. at 235

The order neither imposes any limitation upon nor favors either parent's ability to communicate beliefs concerning Chudakarana or to participate in any other beliefs or practices of their shared Hindu faith. The order does not coerce the father to believe as the mother does; nor does it compel him to practice his religion in a particular way. Contrast Kendall v. Kendall, 426 Mass. at 249-250 (demonstrable physical and psychological harm to the children's Jewish identity justified restricting the father's rights to free exercise of his Fundamentalist Christianity and to determine the religious upbringing of his children). The order leaves open to the parties the opportunity to agree in the future and does not bar future court intervention on this issue should the child be suffering from physical or psychological harm. Finally, the order respects the child's ability to eventually control her own religious destiny while encouraging continued exposure to her parents' religion. See Wisconsin v. Yoder, 406 U.S. at 243 (Douglas, J., dissenting) ("[r]eligion is an individual experience" and children are also granted freedom of religion). In fact, the law encourages a child's "exposure" to her parents' religious views even when the views are divergent, provided the exposure is not harmful. Felton v. Felton, 383 Mass. at 234.

In sum, the evidence as to the impact of performing, or not performing, Chudakarana on the child was insufficient either way to have justified an order restricting either parent's fundamental rights. At such a juncture, the appropriate recourse was an accommodation that intruded least upon both parents' religious inclinations and, at the same time, was compatible with the child's health and well being. The challenged order represents such an accommodation.

2. The order for physical custody. The father also appeals from the judge's order granting physical

custody to the wife. "The decision of which parent will promote a child's best interests 'is a subject peculiarly within the discretion of the judge.'" Bak v. Bak, 24 Mass. App. Ct. 608, 616 (1987) (internal citation omitted). While a judge may consider a guardian ad litem's recommendations, the judge is required to draw his own conclusions: "[T]he responsibility of deciding the case [is] his and not that of the guardian." Delmolino v. Nance, 14 Mass. App. Ct. 209, 212 (1982), quoting from Jones v. Jones, 349 Mass. 259, 265 (1965). Here, the judge found that both parents truly love the child and that the child is equally comfortable with both parents. The judge also found that both parents are willing to meet the child's needs and work together to comply with the parenting plan. The judge accepted the guardian ad litem's finding that both parents agreed that it was appropriate for the wife to stay at home due to the child's age. The visitation schedule allows the husband to spend every weekend and one day a week with the child. The judge did not abuse his discretion in awarding joint legal custody to the parents and designating the wife's residence as the child's primary residence with liberal visitation to the husband.

Judgment affirmed.